

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of the)
COMMUNITY DEVELOPMENT COMMISSION,)
COUNTY OF LOS ANGELES,)
Requesting Additional)
Grant Funding and Other Relief)
Relative to the Lake Hughes Project.)
Grant No. C-06-1821-510.)
Our File No. G-121.)

ORDER NO. WQ 91-02-CWP

BY THE BOARD:

The Community Development Commission, County of Los Angeles (Commission), seeks additional grant funding and other relief relative to two elements of a wastewater treatment project, commonly referred to as the Lake Hughes Project (Project), which is being constructed by the Commission.

We have determined that the petition should be granted in part and denied in part.

I. BACKGROUND

Federal and state Clean Water construction grants were awarded to the County of Los Angeles in 1988 for construction of a wastewater treatment project on behalf of the Community of Lake Hughes. The Project was to include construction of a sewer collection system, treatment facility, and effluent disposal system to serve dwellings in the Lake Hughes area which were located within a discharge prohibition area established by the

Los Angeles Regional Water Quality Control Board (Regional Board). The prohibition was established to protect the waters of Lake Hughes from pollution due to discharge of untreated effluent into the Lake. In addition to the Clean Water construction grants which were provided, the state awarded a State Supplemental Assistance Grant (SSAG) of \$1.2 million for the Project in 1989. During 1990 the original SSAG was increased by some \$650,000 to cover unanticipated increased construction costs being incurred on the Project. All of the grants involved are being administered by the Commission on behalf of the County of Los Angeles and the Lake Hughes area.

Prior to award of construction grants for the Project, the Commission supplied plans and specifications for the proposed Project to the State Board Division of Clean Water Programs (Division) for review and approval. The plans and specifications which were submitted to the Division did not indicate the existence of eight or so unsewered cabins which are located along the south shore of Lake Hughes, nor did the submitted plans and specifications include proposed facilities which would serve these cabins. The Division, under the mistaken impression that the Project as designed would serve all unsewered dwellings within the prohibition area, approved the plans and specifications.

In late 1989 the Commission sought additional SSAG funding of \$180,000 from the Division to cover the cost of construction of the collector sewers necessary to serve the eight

or so south shore cabins which had not been included in the approved Project plans and specifications. The Division declined to provide the additional grant funding. The primary reason for denial involved a determination that failure to include facilities necessary to serve the cabins in question in the original plans and specifications was the result of an unacceptable oversight by the Commission. The Division concluded the oversight should be corrected by Project change order, with the cost of the change order funded from the contingency funds available under the existing Clean Water construction grants, rather than by grant increase in the SSAG. The Division also took the position that, regardless of whether additional grant funding was provided, the Commission was obligated to construct the facilities necessary to serve the eight or so cabins in question because of an implied commitment to construct a project which would eliminate all untreated sewage discharges to Lake Hughes from the prohibition area.

Also in early 1990 the Commission requested a SSAG grant increase of \$122,000 to cover the cost of an intra-channel clarifier constructed as part of the Project. The Division denied the request on the grounds that the specifications for acquisition of this clarifier violated both state and federal procurement and competitive bid requirements. The Division further concluded that Project costs which do not meet federal procurement requirements cannot receive SSAG funding.

The Commission appealed the Division's determinations. While the petition presents the collector sewer dispute in part as a funding issue, the pivotal issue is whether the Commission is bound to construct these additional sewers regardless of whether additional grant funding is provided.

On November 11, 1990, Board Member Ted Finster held an informal meeting with Commission representatives and State Board staff to review the issues and hear arguments and statements relative to the petition.

II. CONTENTIONS AND FINDINGS

(A) THE COLLECTOR SEWERS:

Contentions: With respect to the eight or so cabins on the south shore of Lake Hughes which were not included within the approved plans and specifications for the Project, the Division determined that these cabins were included within the area of prohibition established by the Regional Board, and that facilities necessary to serve these cabins were considered in the final approved EIR and in the final Project Report for the Project. The Division contends that necessary facilities to serve these cabins should have been included in the plans and specifications presented for the Project, that failure to include the necessary facilities was either inadvertent or the result of an unacceptable error on the part of the Commission, and that there is an implied commitment on the part of the Commission to construct the necessary facilities for these cabins whether or

not additional SSAG funding is provided. The Commission, on the other hand, contends that the cabins in question were not included within the prohibition area, that facilities to serve these cabins were not considered in the environmental documents relative to the Project or in the Project Report, that such facilities are not included within the approved plans and specifications for the Project, and consequently that the Commission is not obligated to build these facilities under its existing grants.

Findings: The Commission's position is correct. The obligations of a grantee, such as the Commission, to the state and federal governments rest on the contracts between the grantee and these agencies. The grant contracts in this case in turn rest on a set of approved plans and specifications for the Project. The Commission's final grant obligation in this case was to construct, operate, and maintain those facilities which are shown in the approved plans and specifications for the Project. It is undisputed that the approved plans and specifications for the Project do not include collector sewers to serve the cabins in question and, as a consequence, we find that the Commission has no legal obligation to do so under its existing grant contracts.

The foregoing finding makes the remainder of the contentions of both the Division and the Commission largely immaterial.

(B) SSAG FUNDING FOR THE INTRA-CHANNEL CLARIFIER:

Contentions: The Commission contends that it met both federal and state procurement requirements in its specification relative to acquisition of the intra-channel clarifier which was constructed as part of the Project. Therefore, the Commission contends it should receive grant funding for the cost of this clarifier. The Division, on the other hand, contends that the Project specifications relative to the intra-channel clarifier in substance essentially limited competition to one specific product, the intra-channel clarifier manufactured by United Industries, Inc. The Division contends this limitation violates both state and federal procurement and competitive bid requirements.

Findings: The specifications in question violate both state and federal procurement and competitive bid requirements. Applicable federal law and regulations require that procurement be conducted in a manner that will provide "maximum open and free competition" and generally provide that "procurement practices shall not unduly restrict competition or eliminate competition." (40 C.F.R. 33.230 (a) and (b).) Federal regulations further provide that project specifications must not contain features which unduly restrict competition and require that grantees avoid use of detailed product specifications where possible. (40 C.F.R. 33.255). Where equipment acquisition is involved, federal law and regulations generally permit use of specifications which call for a single brand or trade name

followed by the words "or equal" so long as the effect of this approach does not unfairly or unreasonably limit competition.

California law on equipment procurement by public agencies, such as the Commission, differs in some respects from the federal approach. Equipment specifications which directly or indirectly limit bidding to the product of one manufacturer are precluded. Specification by brand or trade name is permitted, but, insofar as relevant to this case, California law requires that if brand or trade names are used then two brand or trade names must be set forth followed by the words "or equal". Use of one brand or trade name is permissible only if no more than one brand or trade name is known to the specifying agency. (Cal. Pub. Contract Code § 3400.)

In this case, the General specifications for the Project called for installation of an intra-channel clarifier which had certain characteristics and which must be "as manufactured by United Industries, Inc.....or equal". In some respects this appears to be an attempt at a "one or equal" specification. The General specification was followed by additional detailed requirements which must be met if an alleged "equal" were to be offered on the Project. Superficially, the "one or equal" brand name federal requirement was met. However, the General and detailed specifications used by the Commission were so drafted that no intra-channel clarifier other than the product of United Industries, Inc., could meet the detailed specifications. Specifications of this nature are nothing more

nor less than disguised sole source specifications which violate federal procurement requirements. (City of Eaton, Ohio, EPA Region V, September 13, 1982; City of Chelan, Washington, EPA Region X, May 9, 1986.)

State procurement and competitive bid requirements were also violated. As indicated above, where brand or trade names are used, state law generally requires specification of two or more brand names followed by the words "or equal" unless only one brand name is known to the specifying agency. Commission representatives contend that the California requirements were met because they were only aware of one brand name intra-channel clarifier that would meet their needs, the clarifier produced by United Industries, Inc. However, it is clear from the material presented at the informal meeting held with Commission representatives that there were a number of other brand name intra-channel clarifiers that would have met Project needs and that at least one of these, an intra-channel clarifier manufactured by Burns and McDonnell Treatment System, was known to Commission representatives. This intra-channel clarifier had in fact been specified as a second brand name clarifier in early versions of the specifications for the Project until these specifications were modified to essentially limit procurement to the intra-channel clarifier manufactured by United Industries, Inc.

For the reasons indicated, we find that the Commission's specifications relative to acquisition of the intra-

channel clarifier for the Project violated both state and federal procurement and competitive bid requirements.

It also appears, and we find, that Division staff advised the Commission's representatives on numerous occasions, and in a timely manner, that the proposed final intra-channel clarifier specifications were unduly restrictive and that grant funding for the cost of the intra-channel clarifier would not be provided unless the specifications were modified to permit a more open competitive process. The Commission declined to modify the specifications despite Division staff recommendations.

The SSAG is a state grant which is not dependent on federal requirements. The Division's position that it cannot provide additional SSAG funding because federal procurement requirements were violated is not well taken. State procurement and competitive bid requirements do apply. The State Board has legal authority to elect not to enforce the state procurement requirements and may fund the intra-channel clarifier costs if the Board wishes to do so. We believe the state procurement and competitive bid requirements should be enforced in this case. Given the fact that the Commission had more than sufficient opportunity to modify the overly restrictive specifications to assure funding for the intra-channel clarifier costs and chose not to do so, we do not believe that it is either appropriate or prudent to supply additional state funding for these costs.

III. SUMMARY, CONCLUSIONS, AND ADDITIONAL DISCUSSION

1. Under its existing grants, the Commission is not required to construct the additional collector sewers necessary to serve the eight or so cabins in question which are located on the south shore of Lake Hughes. Because these facilities are not included in approved plans and specifications for the Project, they are not part of the current grant funded project.

2. The Project specifications relative to acquisition of the intra-channel clarifier for the Project violated both state and federal procurement and competitive bid requirements. The Division decision to deny additional SSAG funding was appropriate and should be affirmed.

3. One other matter deserves comment in this order. During Board Member Finster's review of the petition, it became apparent that certain collection system lines on the south shore of Lake Hughes which are included within the approved plans and specifications for the Project have not been constructed. The lines in question are commonly referred to as Collector Sewer Lines 'B', 'C', and 'CC'. There is a dispute between the Commission and the Project contractor over the obligation of this contractor to complete the lines in question. Consequently, there is some doubt concerning when these lines will be constructed and whether the Lines will be completed in an expeditious manner. The Commission has an existing enforceable legal obligation under its present grant contracts to

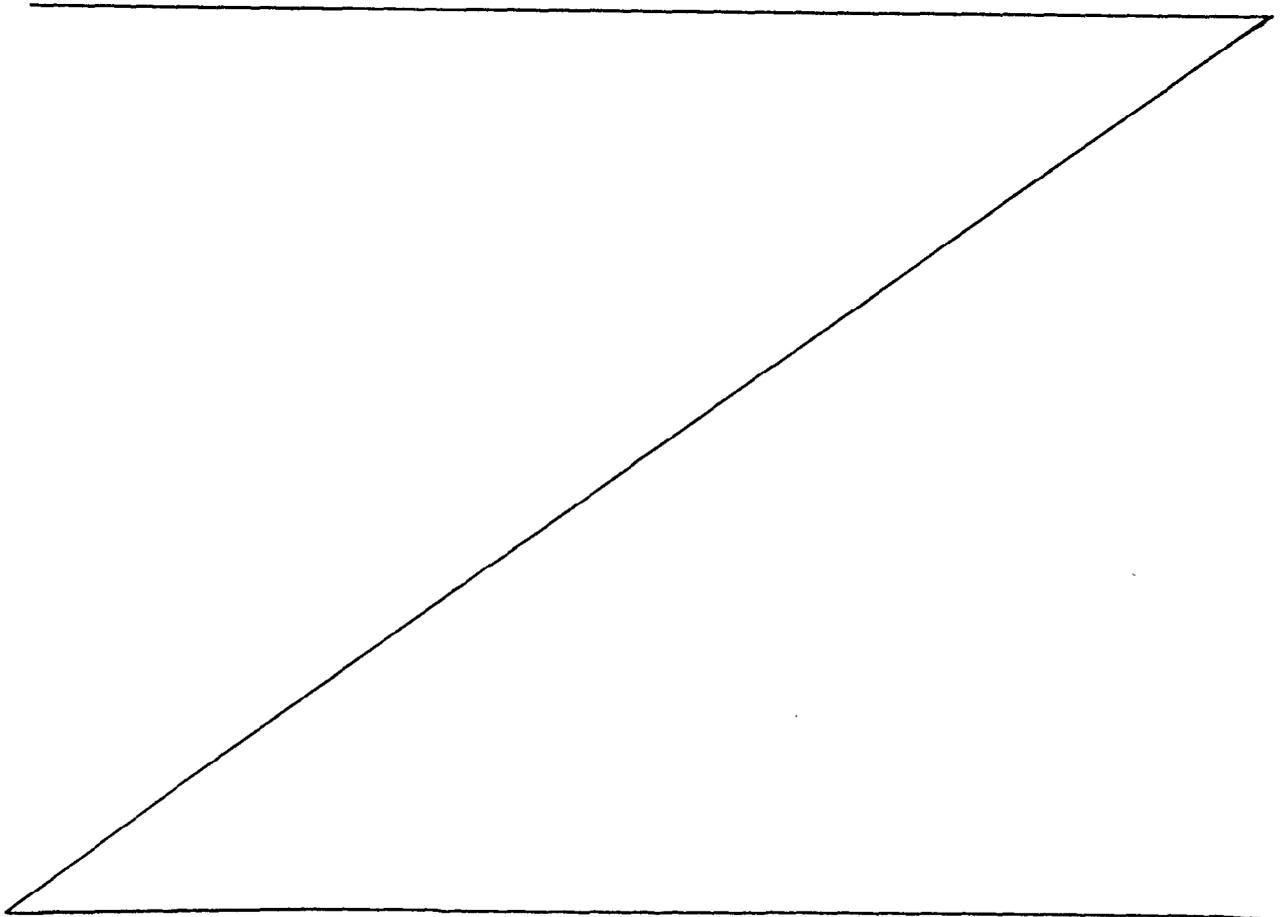
expeditiously complete Lines 'B', 'C', and 'CC' without additional grant funding and in full accordance with its present grant commitments.

IV. ORDER

IT IS THEREFORE ORDERED:

1. The Commission's petition for a determination that it is not obligated, under its current grants, to provide facilities to serve the eight or so cabins in question which are located on the south shore of Lake Hughes is granted.

2. The Commission's petition for additional SSAG funding for the acquisition cost of intra-channel clarifier is denied.



3. The Division is directed to assure that all facilities, specifically including Collector Sewer Lines 'B', 'C', and 'CC' are expeditiously completed by the Commission in accordance with the Commission's grant commitments.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 16, 1991.

AYE: W. Don Maughan
Edwin H. Finster
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to
the Board

3. The Division is directed to assure that all facilities, specifically including Collector Sewer Lines 'B', 'C', and 'CC' are expeditiously completed by the Commission in accordance with the Commission's grant commitments.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 16, 1991.

AYE: W. Don Maughan
Edwin H. Finster
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to
the Board

3. The Division is directed to assure that all facilities, specifically including Collector Sewer Lines 'B', 'C', and 'CC' are expeditiously completed by the Commission in accordance with the Commission's grant commitments.

CERTIFICATION

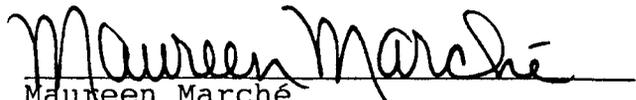
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 16, 1991.

AYE: W. Don Maughan
Edwin H. Finster
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to
the Board

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of the)
)
 COMMUNITY DEVELOPMENT COMMISSION,)
 COUNTY OF LOS ANGELES,)
)
 Requesting Additional)
 Grant Funding and Other Relief)
 Relative to the Lake Hughes Project.)
 Grant No. C-06-1821-510.)
 Our File No. G-121.)
 _____)

ORDER NO. WQ 91-02-CWP

BY THE BOARD:

The Community Development Commission, County of Los Angeles (Commission), seeks additional grant funding and other relief relative to two elements of a wastewater treatment project, commonly referred to as the Lake Hughes Project (Project), which is being constructed by the Commission.

We have determined that the petition should be granted in part and denied in part.

I. BACKGROUND

Federal and state Clean Water construction grants were awarded to the County of Los Angeles in 1988 for construction of a wastewater treatment project on behalf of the Community of Lake Hughes. The Project was to include construction of a sewer collection system, treatment facility, and effluent disposal system to serve dwellings in the Lake Hughes area which were located within a discharge prohibition area established by the

Los Angeles Regional Water Quality Control Board (Regional Board). The prohibition was established to protect the waters of Lake Hughes from pollution due to discharge of untreated effluent into the Lake. In addition to the Clean Water construction grants which were provided, the state awarded a State Supplemental Assistance Grant (SSAG) of \$1.2 million for the Project in 1989. During 1990 the original SSAG was increased by some \$650,000 to cover unanticipated increased construction costs being incurred on the Project. All of the grants involved are being administered by the Commission on behalf of the County of Los Angeles and the Lake Hughes area.

Prior to award of construction grants for the Project, the Commission supplied plans and specifications for the proposed Project to the State Board Division of Clean Water Programs (Division) for review and approval. The plans and specifications which were submitted to the Division did not indicate the existence of eight or so unsewered cabins which are located along the south shore of Lake Hughes, nor did the submitted plans and specifications include proposed facilities which would serve these cabins. The Division, under the mistaken impression that the Project as designed would serve all unsewered dwellings within the prohibition area, approved the plans and specifications.

In late 1989 the Commission sought additional SSAG funding of \$180,000 from the Division to cover the cost of construction of the collector sewers necessary to serve the eight

or so south shore cabins which had not been included in the approved Project plans and specifications. The Division declined to provide the additional grant funding. The primary reason for denial involved a determination that failure to include facilities necessary to serve the cabins in question in the original plans and specifications was the result of an unacceptable oversight by the Commission. The Division concluded the oversight should be corrected by Project change order, with the cost of the change order funded from the contingency funds available under the existing Clean Water construction grants, rather than by grant increase in the SSAG. The Division also took the position that, regardless of whether additional grant funding was provided, the Commission was obligated to construct the facilities necessary to serve the eight or so cabins in question because of an implied commitment to construct a project which would eliminate all untreated sewage discharges to Lake Hughes from the prohibition area.

Also in early 1990 the Commission requested a SSAG grant increase of \$122,000 to cover the cost of an intra-channel clarifier constructed as part of the Project. The Division denied the request on the grounds that the specifications for acquisition of this clarifier violated both state and federal procurement and competitive bid requirements. The Division further concluded that Project costs which do not meet federal procurement requirements cannot receive SSAG funding.

The Commission appealed the Division's determinations. While the petition presents the collector sewer dispute in part as a funding issue, the pivotal issue is whether the Commission is bound to construct these additional sewers regardless of whether additional grant funding is provided.

On November 11, 1990, Board Member Ted Finster held an informal meeting with Commission representatives and State Board staff to review the issues and hear arguments and statements relative to the petition.

II. CONTENTIONS AND FINDINGS

(A) THE COLLECTOR SEWERS:

Contentions: With respect to the eight or so cabins on the south shore of Lake Hughes which were not included within the approved plans and specifications for the Project, the Division determined that these cabins were included within the area of prohibition established by the Regional Board, and that facilities necessary to serve these cabins were considered in the final approved EIR and in the final Project Report for the Project. The Division contends that necessary facilities to serve these cabins should have been included in the plans and specifications presented for the Project, that failure to include the necessary facilities was either inadvertent or the result of an unacceptable error on the part of the Commission, and that there is an implied commitment on the part of the Commission to construct the necessary facilities for these cabins whether or

not additional SSAG funding is provided. The Commission, on the other hand, contends that the cabins in question were not included within the prohibition area, that facilities to serve these cabins were not considered in the environmental documents relative to the Project or in the Project Report, that such facilities are not included within the approved plans and specifications for the Project, and consequently that the Commission is not obligated to build these facilities under its existing grants.

Findings: The Commission's position is correct. The obligations of a grantee, such as the Commission, to the state and federal governments rest on the contracts between the grantee and these agencies. The grant contracts in this case in turn rest on a set of approved plans and specifications for the Project. The Commission's final grant obligation in this case was to construct, operate, and maintain those facilities which are shown in the approved plans and specifications for the Project. It is undisputed that the approved plans and specifications for the Project do not include collector sewers to serve the cabins in question and, as a consequence, we find that the Commission has no legal obligation to do so under its existing grant contracts.

The foregoing finding makes the remainder of the contentions of both the Division and the Commission largely immaterial.

(B) SSAG FUNDING FOR THE INTRA-CHANNEL CLARIFIER:

Contentions: The Commission contends that it met both federal and state procurement requirements in its specification relative to acquisition of the intra-channel clarifier which was constructed as part of the Project. Therefore, the Commission contends it should receive grant funding for the cost of this clarifier. The Division, on the other hand, contends that the Project specifications relative to the intra-channel clarifier in substance essentially limited competition to one specific product, the intra-channel clarifier manufactured by United Industries, Inc. The Division contends this limitation violates both state and federal procurement and competitive bid requirements.

Findings: The specifications in question violate both state and federal procurement and competitive bid requirements. Applicable federal law and regulations require that procurement be conducted in a manner that will provide "maximum open and free competition" and generally provide that "procurement practices shall not unduly restrict competition or eliminate competition." (40 C.F.R. 33.230 (a) and (b).) Federal regulations further provide that project specifications must not contain features which unduly restrict competition and require that grantees avoid use of detailed product specifications where possible. (40 C.F.R. 33.255). Where equipment acquisition is involved, federal law and regulations generally permit use of specifications which call for a single brand or trade name

followed by the words "or equal" so long as the effect of this approach does not unfairly or unreasonably limit competition.

California law on equipment procurement by public agencies, such as the Commission, differs in some respects from the federal approach. Equipment specifications which directly or indirectly limit bidding to the product of one manufacturer are precluded. Specification by brand or trade name is permitted, but, insofar as relevant to this case, California law requires that if brand or trade names are used then two brand or trade names must be set forth followed by the words "or equal". Use of one brand or trade name is permissible only if no more than one brand or trade name is known to the specifying agency. (Cal. Pub. Contract Code § 3400.)

In this case, the General specifications for the Project called for installation of an intra-channel clarifier which had certain characteristics and which must be "as manufactured by United Industries, Inc.....or equal". In some respects this appears to be an attempt at a "one or equal" specification. The General specification was followed by additional detailed requirements which must be met if an alleged "equal" were to be offered on the Project. Superficially, the "one or equal" brand name federal requirement was met. However, the General and detailed specifications used by the Commission were so drafted that no intra-channel clarifier other than the product of United Industries, Inc., could meet the detailed specifications. Specifications of this nature are nothing more

nor less than disguised sole source specifications which violate federal procurement requirements. (City of Eaton, Ohio, EPA Region V, September 13, 1982; City of Chelan, Washington, EPA Region X, May 9, 1986.)

State procurement and competitive bid requirements were also violated. As indicated above, where brand or trade names are used, state law generally requires specification of two or more brand names followed by the words "or equal" unless only one brand name is known to the specifying agency. Commission representatives contend that the California requirements were met because they were only aware of one brand name intra-channel clarifier that would meet their needs, the clarifier produced by United Industries, Inc. However, it is clear from the material presented at the informal meeting held with Commission representatives that there were a number of other brand name intra-channel clarifiers that would have met Project needs and that at least one of these, an intra-channel clarifier manufactured by Burns and McDonnell Treatment System, was known to Commission representatives. This intra-channel clarifier had in fact been specified as a second brand name clarifier in early versions of the specifications for the Project until these specifications were modified to essentially limit procurement to the intra-channel clarifier manufactured by United Industries, Inc.

For the reasons indicated, we find that the Commission's specifications relative to acquisition of the intra-

channel clarifier for the Project violated both state and federal procurement and competitive bid requirements.

It also appears, and we find, that Division staff advised the Commission's representatives on numerous occasions, and in a timely manner, that the proposed final intra-channel clarifier specifications were unduly restrictive and that grant funding for the cost of the intra-channel clarifier would not be provided unless the specifications were modified to permit a more open competitive process. The Commission declined to modify the specifications despite Division staff recommendations.

The SSAG is a state grant which is not dependent on federal requirements. The Division's position that it cannot provide additional SSAG funding because federal procurement requirements were violated is not well taken. State procurement and competitive bid requirements do apply. The State Board has legal authority to elect not to enforce the state procurement requirements and may fund the intra-channel clarifier costs if the Board wishes to do so. We believe the state procurement and competitive bid requirements should be enforced in this case. Given the fact that the Commission had more than sufficient opportunity to modify the overly restrictive specifications to assure funding for the intra-channel clarifier costs and chose not to do so, we do not believe that it is either appropriate or prudent to supply additional state funding for these costs.

III. SUMMARY, CONCLUSIONS, AND ADDITIONAL DISCUSSION

1. Under its existing grants, the Commission is not required to construct the additional collector sewers necessary to serve the eight or so cabins in question which are located on the south shore of Lake Hughes. Because these facilities are not included in approved plans and specifications for the Project, they are not part of the current grant funded project.

2. The Project specifications relative to acquisition of the intra-channel clarifier for the Project violated both state and federal procurement and competitive bid requirements. The Division decision to deny additional SSAG funding was appropriate and should be affirmed.

3. One other matter deserves comment in this order. During Board Member Finster's review of the petition, it became apparent that certain collection system lines on the south shore of Lake Hughes which are included within the approved plans and specifications for the Project have not been constructed. The lines in question are commonly referred to as Collector Sewer Lines 'B', 'C', and 'CC'. There is a dispute between the Commission and the Project contractor over the obligation of this contractor to complete the lines in question. Consequently, there is some doubt concerning when these lines will be constructed and whether the Lines will be completed in an expeditious manner. The Commission has an existing enforceable legal obligation under its present grant contracts to

expeditiously complete Lines 'B', 'C', and 'CC' without additional grant funding and in full accordance with its present grant commitments.

IV. ORDER

IT IS THEREFORE ORDERED:

1. The Commission's petition for a determination that it is not obligated, under its current grants, to provide facilities to serve the eight or so cabins in question which are located on the south shore of Lake Hughes is granted.

2. The Commission's petition for additional SSAG funding for the acquisition cost of intra-channel clarifier is denied.

3. The Division is directed to assure that all facilities, specifically including Collector Sewer Lines 'B', 'C', and 'CC' are expeditiously completed by the Commission in accordance with the Commission's grant commitments.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 16, 1991.

AYE: W. Don Maughan
Edwin H. Finster
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to
the Board